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MICHAEL ROBAK, JR.

In the Supreme Court of the United States

October Term, 1973
No. 73-1336

LARRY HARDY
and
PUSSYCAT CINEX, INC.,
Petitioners,
vs.
STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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To: *The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Common Pleas Court of Cuyahoga County, the Court of Appeals of Cuyahoga County, and the Supreme Court of Ohio. The Court of Appeals reversed the ruling of the

Common Pleas Court without opinion. The Supreme Court of Ohio unanimously reversed the Court of Appeals with a written opinion.

The Ohio Supreme Court decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

QUESTIONS PRESENTED

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. A corporation is not protected by the Fifth Amendment privilege against self-incrimination and a manager of the corporation who is responsible for the showing of all the films owned by the corporation may not withhold production of the films on the ground that he personally might be incriminated by their production.

2. A corporation is not protected by the constitutional privilege against self-incrimination and a corporate employee may not withhold property of the corporation on the ground that his corporation would be incriminated.

3. Allegedly obscene motion picture films kept in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination even though production of the films might tend to incriminate their keeper personally.

4. The Fifth Amendment privilege against self-incrimination applies only to testimonial or communicative acts on the part of the person to whom the privilege applies, and does not apply to acts non-communicative in nature.

5. The trial court was justified, based on the evidence adduced at an adversary hearing, in holding the theater manager of the corporation in contempt of court for refusing to produce allegedly obscene films where the record reveals that the manager admitted that he was responsible for the showing of all films at the theater and that the films were under his control and accessible to him.

STATEMENT OF FACTS

On November 4, 1971 at approximately 11:00 a.m. James G. Kennelly, a detective in the Cleveland Police Department, paid a $4 admission fee to view five short motion picture films at the Pussycat Cinex Theater, located in the City of Cleveland.

Following the viewing of the films, the detective swore to an affidavit explicitly describing scenes therein, of acts of sexual intercourse, penetration, oral sodomy, ejaculation and cunnilingus.

Thereupon, the Prosecuting Attorney for Cuyahoga County, moved in the Court of Common Pleas for an adversary hearing to determine whether these films were in fact obscene.

The court granted the motion and issued an order to the Pussycat Cinex Theater, informing it of the motion and granting a full opportunity for a complete hearing. The court also stated in the order:

> "That in the event the said Pussycat Cinex does not desire to produce said films at this hearing that the owners, management, operators and employees of this Pussycat Cinex do not conceal, destroy, tamper with or alter or remove the said movie films entitled 'ious Lush,' 'xie Tricks,' 'Tit for Tat,' 'Salesman,' and 'Bi-

Girl,' from the premises of the Pussycat Cinex until further order of the court following the adversary hearing to be held on Friday, November 5, 1971."

The order also provided that any violation of any portion of the court order would be determined to be contempt of court.

The Cleveland Police Department then returned to the Pussycat Cinex and the court order was served at 3:10 p.m. that same afternoon, November 4, 1971 on one Larry Hardy.

The police department further ascertained that the films that they had viewed earlier in the morning were still showing in the afternoon.

The record indicates that, at the adversary hearing held on Friday, November 4, 1971, the manager, Larry Hardy testified that he was the manager of the Pussycat Cinex, that he worked for that corporation and that he was responsible for the showing of all the films on the premises.

He further testified that he saw a copy of the court's order of November 4, 1971 and that at that time the films in question were in the Pussycat Cinex.

The trial court found that there was probable cause that the films in question were obscene and ordered Hardy to produce the films "in court today." Confronted with the court's order, Hardy refused to produce the films on the ground that disclosure of the films would violate his Fifth Amendment rights against self-incrimination.

The court then found Hardy in contempt and ordered him held in County Jail until such time as he produced the films.

REASONS FOR DENYING THE WRIT

The single issue presented by this appeal is whether or not the Pussycat Cinex and its manager, Larry Hardy, should have complied with the court's order to produce certain films which were in Hardy's possession and under his control. The record established that Hardy worked for the corporation and was the manager of the theater. Hardy stated that he had sole responsibility for all the films being shown at the Pussycat Cinex.

A corporation cannot claim the privilege against compulsory self-incrimination. See, for example, *U. S. v. Kordel,* 397 U.S. 1 (1970).

Along those same lines, it has been held that a corporate officer may not withhold testimony or documents on the ground that his corporation could be incriminated, nor may the custodian of corporate books or records withhold them on the ground that he personally might be incriminated by their production. See *Hale v. Hekle,* 201 U.S. 43 (1906); *Wilson v. U. S.,* 221 U.S. 361 (1911); *Essgee Co. v. U. S.,* 262 U.S. 151 (1923); *Curcio v. U.S.,* 354 U.S. 118 (1957).

More importantly, the Supreme Court of the United States in *McFaul v. U. S.,* 364 U.S. 372 (1960), rehearing denied, 364 U.S. 925, held that books and records kept in a representative rather than a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the records might tend to incriminate their custodian personally.

At this juncture, one can perceive that Hardy being an employee of the corporation is not on sound legal ground when he states that self-incrimination was a complete de-

fense for his refusal to turn the films in question over to the trial court.

In *McFaul*, the court reiterated the rule that a trial court will not imprison a witness for failure to produce documents which he does not have unless he is responsible for their unavailability or he is impeding justice by not explaining what happened to them. Again, the court in *McFaul* noted that it was incumbent upon a defendant in a contempt proceeding to show that the records called for by a subpoena did not exist, or that they were not in the defendant's possession or subject to his control at the time when their production was requested.

We submit that the films were in Hardy's possession and subject to his control at all times during the contempt proceedings.

We further submit that the opinion of the Ohio Supreme Court in the instant case was correct. The credibility of the witnesses in a contempt proceeding is, in the last instance, for the judge's determination. See *Nilva v. U. S.*, 352 U.S. 385 (1957), where the Court stated the following:

> "However, his protestations of good faith were subject to appraisal by the court that heard them. It was the judge of his credibility and of the weight to be given to his testimony."

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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